

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

MARIO MICHAEL MAYORGA,
Petitioner,
v.
CHRISTIAN PFEIFFER,
Respondent.

No. 2:22-cv-01940 WBS KJN P

ORDER AND ORDER TO SHOW CAUSE

Petitioner is a state prisoner, proceeding pro se, with a petition for writ of habeas corpus under 28 U.S.C. § 2254. On February 27, 2023, respondent filed a motion to dismiss the habeas petition alleging that claim five is unexhausted. Petitioner did not file an opposition to the motion¹ or otherwise demonstrate he exhausted claim five.

For the reasons set forth below, the court directs the petitioner to indicate how he would like to proceed with this action.

I. Exhaustion Standards

The exhaustion of state court remedies is a prerequisite to granting of a petition for writ of habeas corpus. 28 U.S.C. § 2254(b)(1). To waive exhaustion, respondent's counsel must do so

¹ Local Rule 230(l) provides in part: "Failure of the responding party to file written opposition or to file a statement of no opposition may be deemed a waiver of any opposition to the granting of the motion . . ." Id.

1 explicitly. 28 U.S.C. § 2254(b)(3).² A waiver of exhaustion cannot be implied or inferred. A
 2 petitioner satisfies the exhaustion requirement by providing the highest state court with a full and
 3 fair opportunity to consider all claims before presenting them to the federal court. Picard v.
 4 Connor, 404 U.S. 270, 276 (1971); Middleton v. Cupp, 768 F.2d 1083, 1086 (9th Cir. 1985), cert.
 5 denied, 478 U.S. 1021 (1986).

6 The state court has had an opportunity to rule on the merits when the petitioner has fairly
 7 presented the claim to that court. The fair presentation requirement is met where the petitioner
 8 has described the operative facts and legal theory on which his claim is based. Picard, 404 U.S. at
 9 277-78. Generally, it is “not enough that all the facts necessary to support the federal claim were
 10 before the state courts . . . or that a somewhat similar state-law claim was made.” Anderson v.
 11 Harless, 459 U.S. 4, 6 (1982) (per curiam). Instead,

12 [i]f state courts are to be given the opportunity to correct alleged
 13 violations of prisoners’ federal rights, they must surely be alerted to
 14 the fact that the prisoners are asserting claims under the United States
 15 Constitution. If a habeas petitioner wishes to claim that an
 evidentiary ruling at a state court trial denied him the due process of
 law guaranteed by the Fourteenth Amendment, he must say so, not
 only in federal court, but in state court.

16 Duncan v. Henry, 513 U.S. 364, 365-66 (1995) (per curiam). Accordingly, “a claim for relief in
 17 habeas corpus must include reference to a specific federal constitutional guarantee, as well as a
 18 statement of the facts which entitle the petitioner to relief.” Gray v. Netherland, 518 U.S. 152,
 19 162-63 (1996). The United States Supreme Court has held that a federal district court may not
 20 entertain a petition for habeas corpus unless the petitioner has exhausted state remedies with
 21 respect to each of the claims raised. Rose v. Lundy, 455 U.S. 509, 510 (1982). A mixed petition
 22 containing both exhausted and unexhausted claims must be dismissed. Id.

23 II. Discussion

24 Petitioner raises five claims in his petition. Claims one through four were included in the
 25 petition for review filed in the California Supreme Court. (ECF No. 13-3.) However, the fifth
 26 claim alleging that his first degree murder conviction is not supported by sufficient evidence of

27 ² A petition may be denied on the merits without exhaustion of state court remedies. 28 U.S.C.
 28 § 2254(b)(2).

1 premeditation and deliberation, was not included in the petition for review. (*Id.*) State court
 2 records do not reflect petitioner filed a habeas petition in the California Supreme Court raising his
 3 fifth claim.³ After reviewing the record in this action, the court finds that petitioner failed to
 4 exhaust state court remedies as to claim five. Accordingly, petitioner shall show cause why
 5 respondent's motion to dismiss should not be granted. Petitioner is cautioned that as a pro se
 6 litigant he is responsible to respond to court orders and failure to do so may result in a
 7 recommendation that the action be dismissed for failure to prosecute or to comply with court
 8 orders. Fed. R. Civ. P. 41(b).

9 **III. Petitioner's Options**

10 Because the petition contains an unexhausted claim, this court is required to give
 11 petitioner the choice of exhausting the unexhausted claim by returning to state court or
 12 abandoning the unexhausted claim and solely pursuing the exhausted claims in federal court.
 13 Jefferson v. Budge, 419 F.3d 1013, 1016 (9th Cir. 2005); see also Butler v. Long, 752 F.3d 1177,
 14 1181 (9th Cir. 2014) (per curiam). Accordingly, petitioner must elect to proceed in one of
 15 following four ways.

16 1. Petitioner may choose to dismiss the entire petition without prejudice. However,
 17 this court warns petitioner that dismissal of the present proceeding (even dismissal "without
 18 prejudice") could contribute toward a statute of limitations bar against any federal petition he
 19 might subsequently file.⁴

20 ³ Courts may take judicial notice of facts that are "not subject to reasonable dispute because it . . .
 21 can be accurately and readily determined from sources whose accuracy cannot reasonably be
 22 questioned," Fed. R. Evid. 201(b), including undisputed information posted on official websites.
 23 Daniels-Hall v. National Education Association, 629 F.3d 992, 999 (9th Cir. 2010). It is proper to
 24 take judicial notice of the docket sheet of a California court. White v. Martel, 601 F.3d 882, 885
 25 (9th Cir. 2010). The official website of the California state courts is www.courts.ca.gov.

26 ⁴ The habeas corpus statute imposes a one-year statute of limitations for filing non-capital habeas
 27 corpus petitions in federal court. In most cases, the one-year period will start to run on the date on
 28 which the state court judgment became final by the conclusion of direct review or the expiration of
 time for seeking direct review, although the statute of limitations is tolled while a properly filed
 application for state postconviction or other collateral review is pending. 28 U.S.C. § 2244(d).
 Although 28 U.S.C. § 2244(d)(2) tolls limitations during the pendency of "a properly filed application
 for State post-conviction or other collateral review," limitations may not have been tolled during the
 pendency of the instant federal petition. See Duncan v. Walker, 533 U.S. 167 (2001).

1 2. Petitioner may proceed on an amended petition raising only the exhausted claims
2 one through four described above. Petitioner should provide an amended petition if he chooses
3 this option.

4 3. Petitioner may file a request to stay this action pending exhaustion of state court
5 remedies with respect to the unexhausted claim pursuant to Rhines v. Weber, 544 U.S. 269
6 (2005). Under Rhines, the court may stay a habeas petition containing exhausted and
7 unexhausted claims if petitioner demonstrates (1) good cause for the failure to previously exhaust
8 the claims in state court, (2) the claims at issue are potentially meritorious, and (3) petitioner has
9 been diligent in pursuing relief. Id. at 277-78; see also Mena v. Long, 813 F.3d 907, 910-12 (9th
10 Cir. 2016). If petitioner opts to seek a stay under Rhines, he must support his motion for stay by
11 addressing all three Rhines factors because all three factors must be met to obtain a stay under
12 Rhines. If the court grants the request for a Rhines stay, the entire federal habeas petition
13 including the unexhausted claim will be put on hold. Petitioner is not required to file an amended
14 federal habeas petition if he seeks a stay under Rhines.

15 4. Petitioner may file an amended petition which includes only petitioner's fully
16 exhausted federal claims one through four, along with a request that the amended petition be
17 stayed pursuant to Kelly v. Small, 315 F.3d 1063 (9th Cir. 2003). A Kelly stay involves the
18 following three-step process: (1) the petitioner amends his petition to delete any unexhausted
19 claims; (2) the court stays and holds in abeyance the amended, fully exhausted petition, allowing
20 petitioner the opportunity to return to state court to exhaust the deleted claims; and (3) petitioner
21 later amends his petition and reattaches the newly exhausted claims to the original petition. Id.
22 This is a more cumbersome procedure than a Rhines stay because it requires petitioner to file
23 multiple amended federal habeas petitions, but it does not require petitioner to demonstrate good
24 cause for the failure to exhaust. See King v. Ryan, 564 F.3d 1133, 1140 (9th Cir. 2009).
25 However, this court cautions petitioner that choosing this alternative may risk forfeiting
26 consideration of the unexhausted claim in this or any other federal habeas proceeding. See
27 McCleskey v. Zant, 499 U.S. 467 (1991); Rose, 455 U.S. at 520-21; see also 28 U.S.C.
28 § 2244(d)(1) (stating that a one-year period of limitation shall apply to all federal habeas petitions

1 challenging a state court judgment); Rules Governing Section 2254 Cases, Rule 9(b). But the
2 court declines to address at this time whether such a motion would be appropriate or timely under
3 Mayle v. Felix, 545 U.S. 644 (2005). If petitioner chooses to request a Kelly stay, he should
4 provide an amended petition.

5 **IV. Conclusion**

6 In accordance with the above, IT IS HEREBY ORDERED that:

7 1. Petitioner shall show cause why respondent's motion to dismiss should not be granted
8 based on petitioner's failure to exhaust claim five; and
9 2. Petitioner shall notify the court, within thirty days from the date of this order, which of
10 the four options he chooses. This court warns petitioner that failure to respond to the court's
11 order may result in a recommendation that this action be dismissed without prejudice, or that
12 claim five be stricken and this action proceed solely on claims one through four.

13 Dated: April 3, 2023

14 
15 KENDALL J. NEWMAN
16 UNITED STATES MAGISTRATE JUDGE

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